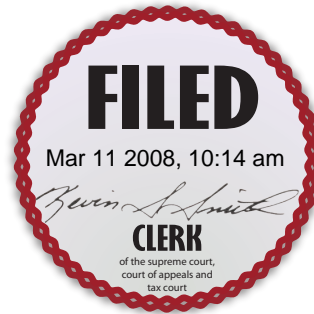


Pursuant to Ind. Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.



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**IN THE
COURT OF APPEALS OF INDIANA**

JESSE J. BLAKEY,)	
)	
Appellant-Defendant,)	
)	
vs.)	No. 03A04-0706-CR-340
)	
STATE OF INDIANA,)	
)	
Appellee-Plaintiff.)	

APPEAL FROM THE BARTHOLOMEW CIRCUIT COURT
The Honorable Stephen R. Heimann, Judge
Cause No. 03C01-9804-CF-607

March 11, 2008

MEMORANDUM DECISION - NOT FOR PUBLICATION

DARDEN, Judge

STATEMENT OF THE CASE

Jesse J. Blakey (“Blakey”), *pro se*, challenges the denial of his petition for leave to file a belated notice of appeal.

We affirm.

ISSUE

Whether the trial court improperly denied Blakey’s petition for leave to file a belated notice of appeal.

FACTS

On April 28, 1998, the State charged Blakey with the murder¹ of Curtis Lengyel. On July 6, 1998, pursuant to an “open plea,”² Blakey pled guilty to one count of murder. At Blakey’s sentencing hearing on August 4, 1998, the trial court imposed a fifty-five year sentence, a \$10,000.00 fine, and court costs in the amount of \$125.00.

On November 9, 1998, Blakey filed a motion of praecipe for record of proceedings, which motion was denied in an order dated November 12, 1998.³ Blakey filed a verified motion for transcript of guilty plea proceedings on November 23, 1998; the trial court denied the motion in its order dated December 15, 1998. On January 18, 2006, Blakey filed a petition for a copy of the record of proceedings. The trial court

¹ Ind. Code § 35-42-1-1.

² “A “fixed plea” specifies the exact number of years to be imposed for sentencing. *Allen v. State*, 865 N.E.2d 686, 689 (Ind. Ct. App. 2007). On the other hand, a plea agreement under which the issue of sentencing is left to the trial court’s discretion is often referred to as an “open plea.” *Collins v. State*, 817 N.E.2d 230, 231 (Ind. 2004).

³ It is not clear why the trial court denied Blakey’s praecipe, as Blakey has included neither the praecipe nor the trial court’s order in his appendix. However, according to the State, “the praecipe was untimely [filed] pursuant to . . . Rule 2(a) of the Indiana Rule of Appellate Procedure in effect at the time of [Blakey]’s conviction and sentencing.” State’s Br. at 5.

granted Blakey's motion on January 19, 2006, and sent the transcript to him on March 9, 2006. On August 10, 2006, Blakey filed a *pro se* motion to correct erroneous sentence, which motion was denied on August 16, 2006. On February 15, 2007, Blakey filed a *pro se* motion for modification of sentence, which motion was denied on February 27, 2007.

On April 19, 2007, Blakey filed a petition for leave to file a belated notice of appeal. The State filed its response on May 21, 2007. On May 22, 2007, the trial court denied Blakey's petition for leave to file a belated notice of appeal, from which order Blakey now appeals.

DECISION

Blakey argues that the trial court erred in denying his petition for permission to file a belated notice of appeal. Petitions for permission to file a belated notice of appeal are governed by Indiana Post-Conviction Rule 2(1), which reads in relevant part:

Where an eligible defendant⁴ convicted after a trial or plea of guilty fails to file a timely notice of appeal, a petition for permission to file a belated notice of appeal for appeal of the conviction may be filed with the trial court, where:

- (a) the failure to file a timely notice of appeal was not due to the fault of the defendant; and
- (b) the defendant has been diligent in requesting permission to file a belated notice of appeal under this rule.

The trial court shall consider the above factors in ruling on the petition. Any hearing on the granting of a petition for permission to file the belated notice of appeal shall be conducted according to [Indiana Post-Conviction Rule 1(5)].

⁴ Post-Conviction Rule 2 defines an "eligible defendant" as "a defendant who, but for the defendant's failure to do so timely, would have the right to challenge on direct appeal a conviction or sentence after a trial or plea of guilty by filing a notice of appeal, filing a motion to correct error, or pursuing an appeal."

If the trial court finds grounds, it shall permit the defendant to file the belated notice of appeal, which notice of appeal shall be treated for all purposes as if filed within the prescribed period.

The decision whether to grant permission to file a belated notice of appeal is within the sound discretion of the trial court, and its decision will not be disturbed unless an abuse of discretion is shown. *Townsend v. State*, 843 N.E.2d 972, 974 (Ind. Ct. App. 2006). Stated differently,

[a] trial court's ruling on a petition for permission to file a belated notice of appeal under Post-Conviction Rule 2 will be affirmed unless it was based on an error of law or a clearly erroneous factual determination (often described in shorthand as [an] 'abuse of discretion').

Moshenek v. State, 868 N.E.2d 419, 423 (Ind. 2007) (quoting *Townsend*, 843 N.E.2d at 974). An abuse of discretion occurs if the trial court's decision is clearly against the logic and effect of the facts and circumstances before it. *Long v. State*, 867 N.E.2d 606, 618 (Ind. Ct. App. 2007). Where, as is the case here, the trial court does not conduct a hearing on a petition for permission to file a belated appeal, "the only basis for its decision is the paper record attached to the petition; because we review this same information upon appeal, we owe no deference to the trial court's decision and our review is *de novo*." *Moshenek*, 868 N.E.2d at 424 (citing *Baysinger v. State*, 835 N.E.2d 223, 224 (Ind. Ct. App. 2005)). The defendant bears the burden of proving by a preponderance of the evidence that he was without fault in the delay of filing and was diligent in pursuing permission to file a belated motion to appeal. *Witt v. State*, 867 N.E.2d 1279, 1281 (Ind. 2007).

Blakey has not met his two-part burden under Indiana Post-Conviction Rule 2(1). In his brief, he launches into the merits of his appeal, but fails to present any cogent argument supported by legal authority to establish that (1) the failure to file a timely notice of appeal was not due to his own fault; and (2) he has been diligent in requesting permission to file a belated notice of appeal.

In his petition for leave to file a belated notice of appeal,⁵ Blakey asserted that

A timely notice of appeal was not filed because [Blakey] was not aware of his right to appeal the sentence he received. Neither the trial court judge nor the [Blakey]’s trial counsel advised [Blakey] of this right. Only recently, after speaking with an inmate at the prison’s law library was [Blakey] advised of the right to appeal his sentence through a direct appeal.⁶ Armed with this newfound knowledge, [Blakey] is now diligently requesting permission to file a belated notice of appeal.

(State’s App. 3). Although Blakey did not submit the guilty plea transcript for our review, he apparently cites passages therein in support of his claim that the trial court did not advise him of his right to challenge his sentence. Given Blakey’s failure to present documentary evidence necessary to support his contention, we must agree with the State’s characterization of Blakey’s statement as “self-serving.” State’s Br. at 7. That said, however, if Blakey’s assertion is correct, and he was not advised of his right to appeal his sentence, our Supreme Court’s holding in *Moshenek* is instructive.

⁵ Blakey failed to include his petition for leave to file a belated notice of appeal in his appendix. We are gratified that the State saw fit to do so.

⁶ In *Collins v. State*, 817 N.E.2d 230, 231-32 (Ind. 2004), our Supreme Court held that the proper vehicle for contesting a trial court’s sentencing decision where the trial court exercised sentencing discretion is a direct appeal. The Court held further that where an individual has failed to file a timely notice of appeal, he can petition for permission to file an appeal under Post-Conviction Rule 2 provided that he meets the applicable standards. *Id.* at 233.

In *Moshenek*, the Supreme Court held that “the right to appeal a sentence is not among those rights of which a trial court is required to inform a defendant before accepting a guilty plea.” 868 N.E.2d at 424. As the court further clarified, “The fact that a trial court did not advise a defendant about this right can establish that the defendant was without fault in the delay of filing a timely appeal; [h]owever, the defendant still must establish diligence.” *Id.* (emphasis added).

Thus, assuming *arguendo* that the failure to file a timely notice of appeal was not due to Blakey’s fault, he must still satisfy the second prong of the inquiry by establishing that he was diligent in requesting permission to file a belated notice of appeal. Although there are no set standards of diligence, several factors are relevant to this inquiry, including “the overall passage of time, the extent to which the defendant was aware of relevant facts, and the degree to which delays are attributable to other parties” *Id.*

Blakey was sentenced on August 4, 1998. In November of 2004, our Supreme Court decided *Collins v. State*, 817 N.E.2d 230, 231-32 (Ind. 2004), wherein it identified a direct appeal as the proper vehicle for challenging a sentence imposed following an open plea. The record reveals that Blakey did not attempt to challenge his sentence until August 10, 2006, and February 15, 2007, when he filed *pro se* motions to correct erroneous sentence and for modification of sentence, respectively.⁷ Moreover, Blakey did not file his petition for leave to file a belated notice of appeal until April 19, 2007,

⁷ Blakey filed his *pro se* motion to correct erroneous sentence eight years after he was sentenced. His subsequent motion for modification of sentence was filed eight and one-half years after the trial court imposed sentence.

nearly three years after *Collins*, and almost nine years after the trial court imposed sentence.

Given the “overall passage of time” preceding Blakey’s challenge to his sentence, he has not established that he has been diligent in requesting permission to file a belated notice of appeal. Thus, Blakey has not met his burden under Indiana Post-Conviction Rule 2(1), and accordingly, we affirm the trial court’s denial of his petition for permission to file a belated notice of appeal.

Affirmed.

BAKER, C.J., and BRADFORD, J., concur.